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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Appellant,

v.

STEPHANIE DOREEN HOROWITZ,

Defendant and Respondent.

E060170

(Super.Ct.No. INF1300789)

OPINION

APPEAL from the Superior Court of Riverside County. William S. Lebov, Judge.  
(Retired judge of the Yolo Super. Ct. assigned by the Chief Justice pursuant to art. VI,  
§ 6 of the Cal. Const.) Reversed and remanded with directions.

Paul E. Zellerbach, District Attorney, and Natalie M. Pitre, Deputy District  
Attorney, for Plaintiff and Appellant.

James R. Bostwick, Jr., under appointment by the Court of Appeal, for Defendant  
and Respondent.

This is an appeal by the People following an order of the trial court granting defendant's motion to strike her prior felony conviction on the ground that she had entered the plea in the prior case in violation of her constitutional rights. On appeal, the People contend that the trial court erred in failing to hold an evidentiary hearing on defendant's constitutional challenge to the validity of her prior conviction as required under *People v. Sumstine* (1984) 36 Cal.3d 909 (*Sumstine*). We agree, and will remand the matter to allow the trial court to conduct an evidentiary hearing.

## I

### FACTUAL AND PROCEDURAL BACKGROUND

On April 4, 2013, a felony complaint consolidated with a petition to revoke defendant's probation was filed alleging that defendant unlawfully possessed stolen property (Pen. Code, § 496, subd. (a)),<sup>1</sup> and thereby violated the terms of her probation in case Nos. INF1203078 and INF1203079. The complaint also alleged that on January 7, 2013, defendant was convicted of a prior serious or violent felony strike conviction (§§ 667, subds. (c) & (e)(1), 1170.12, subd. (c)(1)), to wit, an assault with a deadly weapon other than a firearm (§ 245, subd. (c)).

On August 15, 2013, defendant filed a motion to strike the alleged prior conviction in case No. INF1203078 with supporting documents on the ground that the plea in the prior conviction was obtained in violation of her constitutional rights. Specifically, defendant claimed that she did not knowingly and voluntarily waive her constitutional

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<sup>1</sup> All future statutory references are to the Penal Code unless otherwise stated.

rights when she pled guilty to three counts in case Nos. INF1203078 and INF1203079; that the court never advised her of her constitutional rights under *Boykin-Tahl*;<sup>2</sup> and that she never expressly waived her constitutional rights. In her declaration, defendant alleged that when she entered her pleas she was “confused and anxious” and did not understand what her attorney and the court were telling her.

The felony plea form in case Nos. INF1203078 and INF1203079 indicated that defendant would plead guilty to assault with a deadly weapon, to wit, a metal object, as a strike in violation of section 245, subdivision (a); willfully evading a police officer while driving in violation of Vehicle Code section 2800.2; and embezzlement of a vehicle in violation of section 503. On the plea form, defendant initialed the lines indicating that she had been advised of her rights to trial by judge or jury, to cross-examine the witnesses against her, to compulsory process, to present evidence, against self-incrimination, and to be represented by an attorney. On the plea form, defendant also acknowledged the consequences of her plea.

At the time of the plea hearing in case Nos. INF1203078 and INF1203079, defense counsel stated that he did not join in the plea, but that he had advised defendant of her rights and the consequences of her plea. When the court asked defendant if she understood what had been said, defendant replied, “I think so.” The court responded,

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<sup>2</sup> *Boykin v. Alabama* (1969) 395 U.S. 238, 242 (*Boykin*); *In re Tahl* (1969) 1 Cal.3d 122, 132 (*Tahl*), superseded by statute on another ground as stated in *People v. Carty* (2003) 110 Cal.App.4th 1518, 1523-1524.

“Well, I can’t do it if you think so. I need to make sure you do.” Defendant answered, “Take the deal, yes.” The court informed defendant that she was pleading guilty to a “strike,” which meant if she were convicted of another felony her time would be doubled or more. When asked if she understood, defendant stated, “Yes.”

When the court asked defendant if she had spoken with her attorney about the consequences of her pleas and admissions and the rights she was giving up, defendant asserted, “I’m not really sure what you mean by that.” The court then asked defendant’s attorney to confirm that he had gone over with defendant the consequences of her pleas and admissions, the rights she was waiving, and the additional punishment she might receive in the future due to pleading to a strike. Defendant’s attorney responded, “Yes.” The court then asked defendant if she understood. Defendant responded, “Yes.”

The court thereafter asked defendant how she pled to a violation of section 245, subdivision (a), as a felony strike. Defendant replied, “To these charges I plead guilty.” After further inquiring of defendant, the court stated, “I’m sorry. I can’t go forward because it appears to me with all her hesitation, she’s not understanding what she’s doing.” The court then continued the matter to later in the afternoon.

When the matter resumed, the court explained that “it appeared obvious” defendant was not “quite understanding” what she was entering into and that it could not “take a plea from someone who doesn’t understand what they are entering into.” The court then asked defendant whether she had any questions for the court. Defendant stated she did not. The court also asked defendant whether she wanted to enter her plea

knowing that it was against her attorney's advice. Defendant stated, "Yes." The court thereafter questioned defendant as to whether she had signed several papers including terms and conditions, plea forms, and violation of probation forms; and whether she had gone over those forms with her attorney and discussed the consequences of her pleas and admissions and the rights she was giving up before she personally signed and initialed the forms. Defendant responded, "Yes." The court again asked defendant whether she understood that the assault charge was a strike and could later be used to increase her punishment. Defendant stated, "Yes." Defendant thereafter pled guilty to the three charges. When the court asked defense counsel whether he joined in defendant's pleas and admissions, defense counsel responded that he joined in the fact that he had advised defendant of her rights and believed she understood them but that he did not join in the plea. The court thereafter found the waivers, pleas, and admissions to be entered into freely, voluntarily, and knowingly. The court did not specifically advise defendant of her *Boykin-Tahl* rights.

On October 2, 2013, the People untimely filed an opposition to defendant's motion to strike her prior conviction. The People argued that defendant could not overcome the "strong presumption of constitutional regularity" and that the court "essentially took [d]efendant's plea twice in order to be sure that she understood each of her rights."

A hearing on defendant's motion to dismiss her prior strike conviction was heard on October 2, 2013. At that time, the prosecutor acknowledged that the opposition motion was untimely filed and requested an evidentiary hearing to cross-examine defendant. Defense counsel replied that the People had over a month continuance to respond to defendant's motion; that the People in their opposition paper indicated defendant did not have a right to an evidentiary hearing; and that the documentary evidence submitted in support of defendant's motion clearly showed that defendant did not understand the plea. The trial court denied the People's request for a continuance to conduct an evidentiary hearing or to file further points and authorities. The court found that based on the submitted documents and familiarity with defendant, the plea in defendant's prior case had not been entered into knowingly, intelligently, and voluntarily, and therefore struck the prior strike conviction. Defense counsel thereafter requested that defendant be referred to the Mental Health Court for an evaluation. The court granted the request to allow defendant an opportunity to determine whether she was eligible for the mental health program.

On December 2, 2013, the People filed a notice of appeal. Since the filing of the notice of appeal, defendant pled guilty to receiving stolen property and was placed on formal probation for a period of three years under a mental health program.<sup>3</sup>

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<sup>3</sup> The People request that we take judicial notice of the records in this case, case No. INF1300789, from January 16, 2014. These records include a copy of the January 16, 2014 court's minute order; a copy of the felony plea form signed by defendant on January 16, 2014; and a copy of the sentencing memorandum signed by  
*[footnote continued on next page]*

## II

### DISCUSSION

The People contend that the trial court erred in failing to conduct an evidentiary hearing on defendant's constitutional challenge to the validity of her prior conviction as required by *Sumstine, supra*, 36 Cal.3d 909. We agree.

"[A] trial court, when sentencing a criminal defendant, may not rely on a prior felony conviction obtained in violation of the defendant's constitutional rights." (*People v. Allen* (1999) 21 Cal.4th 424, 429 (*Allen*).) In *Allen, supra*, 21 Cal.4th 424, our Supreme Court reaffirmed the holding of *Sumstine, supra*, 36 Cal.3d 909, that "a criminal defendant, charged with having suffered a prior felony conviction, may move in the trial court to strike the alleged prior conviction on the ground the trial court in the prior proceeding failed to observe the defendant's *Boykin*[-]*Tahl* rights. [Citations]." (*Allen, supra*, at pp. 426-427.)

The Supreme Court in *Sumstine, supra*, 36 Cal.3d 909, set forth a specific procedure that applies when a defendant in a subsequent court proceeding "affirmatively allege[s] that at the time of [a] prior conviction he [or she] did not know of, or did not intelligently waive," his or her constitutional *Boykin-Tahl* rights.<sup>4</sup> (*Sumstine, supra*, 36

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[footnote continued from previous page]

defendant on January 16, 2014. Pursuant to Evidence Code sections 452 and 459, we will grant the People's request.

<sup>4</sup> See *Boykin, supra*, 395 U.S. 238 and *Tahl, supra*, 1 Cal.3d 122, which require that " 'each of . . . three rights . . . self-incrimination, confrontation, and jury

[footnote continued on next page]

Cal.3d at p. 914.) Upon such an allegation, “the trial court must hold an evidentiary hearing” to resolve the question. (*Allen, supra*, 21 Cal.4th at p. 435.) At the hearing, “the prosecution bears the initial burden of producing evidence that the defendant did indeed suffer the conviction. The defendant must then produce evidence to demonstrate his [or her] *Boykin-Tahl* rights were infringed. The prosecution then has the right to rebuttal, at which point reliance on a silent record will not be sufficient.” (*Allen, supra*, 21 Cal.4th at p. 435.)

The *Allen* court explained that a hearing must be held in response to a defendant’s *Sumstine* motion: “[W]hen responding to a *Sumstine* motion, the trial court is specifically required to hold a hearing and take evidence on the voluntariness of the prior plea. Neither the defendant nor the prosecutor is limited to the face of the record in the prior proceeding, but may offer any evidence germane to the defendant’s contention he [or she] was unaware of his [or her] rights when he [or she] pleaded in the prior proceeding. . . . Thus, *Sumstine* anticipates that, in hearing a motion to strike, the trial court will examine the totality of the circumstances to determine the voluntariness and intelligence of the plea, much as the court would do if it were presiding over a hearing held in response to a petition for a writ of habeas corpus.” (*Allen, supra*, 21 Cal.4th at pp. 439-440.)

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trial . . . must be specifically and expressly enumerated for the benefit of and waived by the accused prior to acceptance of his guilty plea.’ ” (*People v. Mosby* (2004) 33 Cal.4th 353, 359, italics omitted.)

Specifically, our Supreme Court found that, although a *Sumstine* hearing “may, in some cases, involve a full-blown trial of contested facts, we reasoned in *Sumstine* that such wide-ranging inquiries should largely be avoided by the rule that *Boykin*[-]*Tahl* waivers be placed on the record to facilitate future review. [Citation.]” (*Allen, supra*, 21 Cal.4th at p. 441.) The court also noted that “the record of the hearing in which the trial court accepted the defendant’s plea should clearly demonstrate the defendant was told of his [or her] rights and that he [or she] affirmatively waived them. Thus, permitting defendants to raise a *Boykin-Tahl* claim in a motion to strike at trial would entail little disruption; a quick review of the transcript of the sentencing hearing may be all that is necessary.” (*Id.* at p. 442.)

In this case, defendant filed a *Sumstine* motion claiming her guilty plea in her prior case was entered in violation of her constitutional rights. Specifically, defendant alleged that although she was advised the assault charge was a felony strike, her attorney and the court never explained the constitutional rights to her and that she did not understand the charges and defenses and what a strike meant. Defendant further asserted that she was not advised of her constitutional rights; that she did not make a knowing and voluntary waiver of her constitutional rights; and that she would not have pled guilty were it not for the error. In her declaration in support of her motion, defendant declared that on the day of the plea hearing, she was very confused and anxious; that she did not understand what her attorney and the judge were telling her; that her attorney told her that if she did not answer “yes,” she would not get out of jail; that her attorney did not read the plea form to

her but just handed it to her and told her to initial and sign; and that had she understood her rights and the consequences of the plea, she would not have pled guilty.

The People contend that defendant failed to make an adequate *Sumstine* showing. The People are incorrect. Under *Sumstine*, to invoke the right to an evidentiary hearing, a defendant need merely “affirmatively allege that at the time of [her] prior conviction [she] did not know of, or did not intelligently waive,” her *Boykin-Tahl* rights at which point, “the court must hold an evidentiary hearing . . . to determine the truth of the allegation.” (*Sumstine, supra*, 36 Cal.3d at p. 914.) It is clear from the record here that defendant made an affirmative allegation sufficient to invoke her rights under *Sumstine*, especially considering that the court found the plea was not entered knowingly, intelligently, and voluntarily after having examined the documents and the transcript of the plea hearing.

Defendant argues that the record shows there was a hearing but it was not as extensive as the People desired and that the court did not deny the People the opportunity to present more evidence. Defendant insists that the People “simply failed to prepare” even though they had “more than six weeks to get ready for the hearing.” We reject defendant’s contention. The record clearly shows that the People requested an evidentiary hearing and sought to cross-examine defendant, who was present at the hearing. The trial court, however, denied that request, depicting it like a motion for a continuance.

Defendant further claims that under the circumstances of this case the trial court properly “treated [defendant’s] moving papers which included the transcript of the prior proceeding, her felony plea form and her declaration as establishing grounds for striking the conviction.” These documents support defendant’s affirmative evidence in support of her *Sumstine* motion in determining whether defendant knowingly and intelligently pled guilty, but identification of such documents on appeal is not a proper substitute for the rebuttal hearing required under *Sumstine*. (*Allen, supra*, 21 Cal.4th at p. 435.) The trial court erred by failing to allow the People to present rebuttal evidence at an evidentiary hearing on the validity of defendant’s prior assault conviction. As previously noted, “when responding to a *Sumstine* motion, the trial court is *specifically required* to hold a hearing and take evidence on the voluntariness of the prior plea.” (*Allen, supra*, 21 Cal.4th at p. 439, italics added.) Although the record indicates that defendant was not advised of her constitutional rights on the record and that defendant appeared confused, “[n]either the defendant nor the prosecutor is limited to the face of the record in the prior proceeding, but may offer *any evidence* germane to the defendant’s contention [she] was unaware of [her] rights when [she] pleaded in the prior proceeding.” (*Id.* at p. 439, italics added.) The trial court was therefore required to examine the totality of the circumstances to determine the voluntariness and intelligence of the plea. (*Id.* at p. 440.)

In sum, the trial court failed to follow our Supreme Court’s directive in *Sumstine* (and its more recent reaffirmance of the *Sumstine* procedures in *Allen*). As such, the trial court erred in striking defendant’s prior strike conviction alleged to have been the result

of an unconstitutional plea without holding the required evidentiary hearing under *Sumstine*. Remand for a full evidentiary hearing is therefore required.

### III

#### DISPOSITION

The matter is reversed and remanded with directions in accordance with this opinion.

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RAMIREZ

P. J.

We concur:

KING

J.

CODRINGTON

J.